

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

FILED
April 10, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

WAYNE DAVIDSON,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

C.C.A. NO. 03C01-9512-CC-00405

ROANE COUNTY

HON. JOHN W. ROLLINS
JUDGE

(Habeas Corpus)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Wayne Davidson appeals the dismissal of his petition for habeas corpus relief. He presents the following issue for review: whether the trial court erred in dismissing his petition on procedural grounds.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

The proof shows that, on May 2, 1985, Appellant was convicted in Meigs County of second degree burglary. As a habitual criminal, he was sentenced to life imprisonment. This Court affirmed the conviction and sentence on appeal. See State v. Davidson, No. 13, 1987 WL 14282 (Tenn. Crim. App. July 21, 1987).

Appellant then filed both a petition for post-conviction relief in the Meigs County Criminal Court and a petition for habeas corpus relief in the Morgan County Criminal Court. In each, he argued, among other things, that the trial court neglected to sentence him orally. The petitions were consolidated and heard on March 18, 1991. At the conclusion of the hearing, the trial court dismissed the consolidated petition. This Court affirmed the dismissal on appeal. See Davidson v. Mills, No. 03C01-9110-CR-00338, 1992 WL 141807 (Tenn. Crim. App. June 25, 1992), perm. app. denied, (Tenn. Nov. 2, 1992).

On January 17, 1995, having been paroled and subsequently re-incarcerated in Roane County for a parole violation, Appellant filed a petition for habeas corpus relief in the Roane County Criminal Court, alleging the same

sentencing issue and ineffective assistance of counsel. On July 17, 1995, the trial court dismissed the petition. Appellant appeals from this dismissal.

II. DISMISSAL OF HABEAS CORPUS PETITION

Appellant alleges that the trial court erred in dismissing his habeas corpus petition. In Tennessee, it is a well established that the remedy of habeas corpus is limited in its nature and its scope. Archer v. State, 851 S.W.2d 157, 161-62 (Tenn. 1993); Passarella v. State, 891 S.W.2d 619, 626 (Tenn. Crim. App. 1994). Habeas corpus relief is available only when "it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered,' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Archer, 851 S.W.2d at 164 (citation omitted in original). The petitioner has the burden of establishing either a void judgment or an illegal confinement. Passarella, 891 S.W.2d at 627. If established by a preponderance of the evidence, the petitioner is entitled to immediate release. Id.

Here, Appellant argues that he was denied effective assistance of counsel in bringing his sentencing claim, both during his direct appeal and during his first attempt at collateral attack. This Court has held that an ineffective assistance of counsel claim, without more, only renders the challenged judgment voidable, not void. See id. As stated previously, habeas corpus relief is available only where a judgment is void. Even if his habeas petition were viewed as a post-conviction petition as provided for by Tennessee Code Annotated Section 40-30-108 (repealed 1995), Appellant would still not be entitled to relief. With respect to his appellate representation, Appellant's ineffective assistance of counsel claim is

barred by the three-year statute of limitations, which began to run on July 21, 1987. See Tenn. Code Ann. § 40-30-102 (repealed 1995). With respect to his post-conviction representation, Appellant's ineffective assistance claim is not cognizable because there is no constitutional right to the effective assistance of counsel in post-conviction proceedings. See House v. State, 911 S.W.2d 705, 712 (Tenn. 1995). Thus, we conclude that the trial court properly dismissed Appellant's petition.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID H. WELLES, JUDGE